IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

MIDAMERICAN ENERGY COMPANY, BLACK HILLS ENERGY, IOWA ASSOCIATION OF ELECTRIC COOPERATIVES, INTERSTATE POWER AND LIGHT CO. and IOWA ASSOCIATION OF MUNICIPAL UTILITIES, Petitioners, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE Respondent.	Case No. CVCV064145 **PETITIONERS' REPLY BRIEF**

MidAmerican Energy Company, Black Hills Energy, Iowa Association of Electric Cooperatives, Interstate Power and Light Company, and Iowa Association of Municipal Utilities (collectively, "Petitioners") offer this Reply to the Iowa Utilities Board's ("Board") Responding Brief, stating:

Where the Parties Agree

The Petitioners and the Board agree in a number of respects. First, that the facts are undisputed. (Responding Br. at 3). The Parties agree that the sunset date of Iowa Code § 476A.10A was June 30, 2022. (Responding Br. at 5). The Parties agree that the Board adjusted the invoicing date in May, 2021. (Responding Br. at 6-7). The Parties agree that the Board issued assessments for five years, "**although the amendments set forth a disbursement schedule spanning only four fiscal years.**" (Responding Br. at 9, emphasis supplied). The Parties agree that the Petitioner Utilities take issue with the timing of the invoices and the amounts actually disbursed. (Responding Br. at 9). The Parties agree that the discrepancies in the amounts sent to the respective funds is not the central issue; whether the Board sent the incorrect amounts along is

not the Petitioners' concern but rather evidence of the incorrect interpretation. (Responding Br. at 16, "Any alleged discrepancies in amounts are irrelevant . . ."). The Parties agree that the issue is one of law, not fact. (Responding Br. at 11). The parties agree that the Board is not due deference on its determination that the tax is owed. (Responding Br. at 11, n. 1).

Where the Parties Differ

The Board justifies its extra assessment, stating it adjusted its invoicing to fulfill its statutory obligation. (Responding Br. at 8). The Board admits the 2018 amendment sets out only four sums due, yet it issued five assessments. (Responding Br. at 9).

The Board does not address its failure to promulgate administrative rules, as required by the statute. Section 476.10A requires the Board to establish a rule that "provide[s] a schedule for remittances" assessed under section 476.10A. The Board does have a rule that addresses the assessments, but it does not provide a schedule for remittances as required by the Iowa Code. 199 IAC 17.7. Had the Board promulgated a schedule as required it could not have deviated from that schedule without proceeding through the rulemaking process. In directing that a schedule be set forth in administrative rule, the legislature indicated it intended the assessments to be regular and predictable in accordance with a set schedule. The legislature did not intend the Board to have discretion in altering the cadence of the assessment. "[I]n resolving statutory disputes, our ultimate goal is to ascertain and give effect to the intent of the legislature." *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011) (internal quotations omitted).

The Parties differ on the import of course of conduct. The Board admits the 2018 amendments set out only four sums due, yet it issued five assessments. The Board, having failed to promulgate the schedule as required, deviated from its almost three decades long cadence without proceeding through the rulemaking process. Iowa Code 17A has a specific ground for

relief based on inconsistency with prior practice. Iowa Code § 17A.19(10)(h). The Board's decision to change the cadence and increase the tax due was arbitrary and capricious. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). The decision to change the cadence was made without regard to the fact that nothing about the law required this change in cadence. *Doe v. Iowa Bd. Of Med. Examiners*, 733 N.W.2d 705, 707 (Iowa 2007) (finding action arbitrary and capricious if made without regard to law or facts).

The Board states that, "The number and amounts of the disbursements to the IEC are undefined . . .." (Responding Br. at 16). Petitioners disagree. The 2018 Amendment sets out four disbursements; therefore, the **number** of disbursements is set forth by the legislature. 2018 Iowa Acts ch. 1172, § 91 (codified at Iowa Code § 476.10A (2018)). The Board asserts, "[t]he ordinary and fair meaning of the statute allows for five assessments/collections to be distributed through four appropriations." (Responding Br. at 16). Petitioners disagree. The ordinary and fair meaning of legislation setting forth four appropriations is to fund it through four assessments, without changing the cadence. Had the legislature intended the Board to levy additional assessments, it could have said so. Taxing statutes are strictly construed against the taxing authority and in favor of the taxpayer, with any doubt resolved in favor of the taxpayer. *Dieleman's Est. v. Dep't of Revenue*, 222 N.W.2d 459, 461 (Iowa 1974) (citing *Northern Natural Gas Company v. Forst*, 205 N.W.2d 692, 697 (Iowa 1973). "When construing tax statutes, we will resolve doubt in favor of the taxpayer." *Naumann v. Iowa Prop. Assessment Appeal Bd.*, 791 N.W.2d 258, 262 (Iowa 2010); *accord Am. Home Prods. Corp. v. Iowa State Bd. of Tax Review,* 302 N.W.2d 140, 142 (Iowa 1981); *Iowa National Industrial Loan Co. v. Iowa State Department of Revenue*, 224 N.W.2d 437, 439 (Iowa 1974). It must appear from the language of a statute that the tax assessed against the

taxpayer was clearly intended." *State ex rel. Iowa Dep't of Transp. v. Gen. Elec. Credit Corp. of Delaware*, 448 N.W.2d 335, 341 (Iowa 1989).

The Board suggests that the Utilities do not dispute that the general fund of the state has not received the final installment of $3,530,000.00 appropriated by the 2018 Amendment. (Responding Br. at 17). The lack of a final installment to the general fund is not due to a lack of assessment, but rather a mistaken allocation from the previous assessment. Had the Board allocated the funds in the manner directed by the 2018 Amendment, there would be no shortfall. Both the Fiscal Services Division of the Legislative Services Agency and the Iowa Energy Center recognized the legislative intent to have one assessment per fiscal year. "Standing Appropriations Bill House File 2502, Notes on Bills and Amendments (NOBA)," Fiscal Services Division, Legislative Services Agency, p. 34 (May 5, 2018), available at: https://www.legis.iowa.gov/docs/publications/NOBA/965880.pdf (last viewed December 19, 2022); Iowa Energy Center 2020 Annual Report, p. 4 (Jan. 15, 2021), available at: https://www.legis.iowa.gov/docs/publications/DF/1212658.pdf (last viewed December 19, 2022). The Board created this allocation problem by assessing the utilities twice during fiscal year 2021 and allocating the funds received in a manner other than that directed by the 2018 amendment.

The Petitioners did not waive challenge under 17A

Petitioners also disagree with the Board's contention that they waived challenge under Iowa Code § 17A. The Board asserts that the correct grounds are (c) and (n), but because the Utilities argued several grounds in addition, that all grounds are waived. (Responding Br. at 11, 19, n.4). The Petitioners disagree. The grounds for Judicial Review are set out at page 11 of Petitioner's brief and the grounds are argued in two subsections (1) and (2). Iowa Code 17A.19(10)(h) is specifically argued at page 14 of the brief. Petitioners presented authority and argument on

the grounds for relief prayed for in the Petition, which is sufficient to avoid claims of waiver. *State v. Short*, 851 N.W.2d 474, 479 (Iowa 2014).

The rate-paying customers will ultimately bear the cost.

The Board's approach does real harm to individual customers. The fifth, May 2022 assessment, if not rescinded, may result in a dollar-for-dollar reduction in funds available for the energy efficiency programs required by statute and authorized by the Board. But perhaps more importantly, this assessment, whether through recovery in future EEP proceedings or as a direct pass through to customers of non-rate-regulated utilities has a direct impact to individual customers and taxpayers. The Board asserts that the legislature has deemed the use of the funds to be worthy of the cost to the taxpayers. (Responding Br. at 19). The problem with this assertion is that the Board, not the legislature, decided to levy the fifth assessment despite the legislature specifying only four were due. The May 2022 assessment is not just an assessment against utilities, it is ultimately a $6.10 million tax bill to individual customers that was not expressly directed by the legislature.

CONCLUSION

For almost three decades, the Board levied the assessment required by Iowa Code § 476.10A in a consistent manner and without complaint by the utilities. In fiscal year 2021, the Board levied two assessments – the second being just a few months early to an assessment the petitioning utilities agree was due. When the Board levied an additional assessment in May, 2022, it violated its past practice and it violated the law. The legislature determined the assessment would sunset as of July 1, 2022. Had the Board maintained its decades' long practice of assessing once per calendar and fiscal year, there would have been no assessment in May, 2022. The rate-paying customers will ultimately bear the burden of this unauthorized tax.

The Petitioners pray this Honorable Court reverse the Board's order, find the May 2022 assessment was improperly invoiced as it was not authorized by Iowa Code § 476.10A and contrary to the Board's long-standing implementation of the statute, order the May 2022 invoice rescinded and any amounts paid by any utility refunded, and award any other relief appropriate under the circumstances.

Respectfully submitted,

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